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IN THE

Supreme Court of the United States

October Term, 1960

No. [redacted]50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
an unincorporated Association,
Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

CITATIONS TO OPINIONS BELOW

The memorandum opinions of the Superior Court of the State of Washington for King County are unreported and are set forth in the record (R. 157-174). The opinion of the Washington Supreme Court is reported in 156 Wash. Dec. 935, 356 P.(2d) 1, and is in the record (R. 192-200).

JURISDICTION

The judgment of the Supreme Court of Washington was entered on November 15, 1960 (R. 200-201). The petition was filed February 13, 1961, and was granted April 3, 1961. The jurisdiction of this court is invoked under 28 USC Sec. 1257 (3), since the rights, privileges and immunities specially set up and claimed under 29 USC Sec. 157, 158 and 185 have been denied.

QUESTIONS PRESENTED

Respondent conducts a flour brokerage business admittedly affecting interstate commerce. Petitioner union struck and maintained a one-man picket at respondent's warehouse for eight days in protest against the discharge of a union member employed by respondent. Some months thereafter it was determined retroactively by arbitration that the employee's work had been unsatisfactory and that such unsatisfactory work had been the reason for his discharge. The collective bargaining agreement between petitioner and respondent did not contain a no-strike clause applicable to this situation but did provide:

> "The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

Neither party at any time applied to the National Labor Relations Board for relief in connection with this strike. The questions presented are:

A. Federal pre-emption of tort action.

(1) Did the Washington Supreme Court's determination that this strike was neither protected by §7 nor prohibited by §8 of the Taft-Hartley Act[1] justify its assumption of jurisdiction of this action in the absence of any such determination by the National Labor Relations Board?

(2) Except for a suit under §301 of the Act, does not the National Labor Relations Board have exclusive primary jurisdiction to determine whether this labor agreement removed this strike from the protection of §7 or the prohibitions of §8 of the Tart-Hartley Act?

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[1]61 Stat 136-158, 29 U.S.C. Secs. 141-187.

(3) Was not this strike, in protest against the employer's firing of a union member, an activity which is arguably protected by §7 or prohibited by §8 of the Taft-Hartley Act?

(4) May the state court award damages in tort for injury caused by this strike in the absence of an initial determination by the National Labor Relations Board that the strike is neither a protected nor a prohibited activity under the Taft-Hartley Act?

B. Violation of Contract.

(5) In the absence of an express or implied no-strike agreement, can this strike constitute a violation of a collective bargaining agreement under §301 of the Taft-Hartley Act?

(6) If the strike was not a violation of contract under §301, did the state court have jurisdiction to award damages for breach of contract under incompatible state doctrines of contract law?

(7) In the absence of an express or implied no-strike agreement, is not a strike in protest against the employer's discharge of a union member an activity protected by §7 of the Taft-Hartley Act?

(8) Has §301 of the Taft-Hartley Act supplanted incompatible substantive law of the State of Washington as to what conduct constitutes a breach of a collective bargaining agreement in an industry affecting interstate commerce?

(9) Was it a violation of this contract (within the meaning of §301) to strike for the purpose of forcing

the reinstatement of a union member who had been discharged for unsatisfactory work, where at the time of the strike the union, on reasonable grounds, contended that the discharge was not because of unsatisfactory work?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those included in the Labor-Management Relations Act of 1947, as amended (61 Stat 136-158, 29 U.S.C. Secs. 141-187), herein and commonly called the "Taft-Hartley Act." Pertinent sections of the Act are reproduced in the Appendix hereto.

STATEMENT OF FACTS

The respondent is a family corporation engaged in the wholesale distribution of flour with its principal place of business and warehouses located at Seattle, Washington, and is an industry admittedly affecting interstate commerce.[2] At all pertinent times respondent employed truckers and warehousemen who were members of the defendant, Local 174 (R. 40). Respondent had a collective bargaining agreement[3] effective from and after April 1, 1955, containing among other things the following provisions (R. 202-208):

"ARTICLE II

"The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

"ARTICLE VI

"Seniority shall prevail in layoffs for all employees

[2]Respondent purchases annually approximately $400,000.00 worth of flour and similar products from outside of the State of Washington, representing approximately 60% of its annual purchases of such products (R. 27-29).

[3]This was a standard contract that petitioner had executed with approximately 475 employers in the city of Seattle (R. 134).

after three (3) months service. In the event of a layoff, the last employees hired shall be the first laid off."

"ARTICLE XIV

"Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party, shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

"Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

On May 12, 1958, "Jack" Welsch, a member of Local 174 and an employee of respondent for over five years (R. 212), started a new fork lift truck while it was in gear and ran it off respondent's platform onto the railroad tracks, with resulting damage to the truck and injury to himself (R. 215). As a result he stayed at home under doctor's care for two weeks (R. 163, 215). Welsch was entitled to two weeks' annual vacation with pay, but had been accustomed to working the full 52 weeks of the year and drawing double pay for two weeks (R. 163, 215). One week of vacation had been given him in April, 1958, and under this arrangement he was entitled to receive a second week's vacation pay by the end of April, 1958, the anniversary of his original employment (R. 137, 163). On Friday, May 23, 1958, respondent delivered to Welsch,

while he was still off work, a check for the second week of vacation, together with a note (R. 137, 163, 219) stating as follows:

> "Memo from
> "NICK LUCAS 5-23-58
> "Jack:
>
> "The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for a part of your vacation and than [then] should we be busy the following week I will call you, otherwise take the second week of your vacation and rest.
>
> "[signed] Pete"

On the same day, Welsch went to Floyd (Russ) Anderson, business agent and vice-president of Local 174, and stated he was ready to go back to work (R. 138). Anderson advised him to get a written release from his doctor and show it to the respondent (R. 112). On the succeeding Monday, Welsch obtained a written release from his doctor (R. 138) which he showed to Pete Conom, secretary-treasurer of the respondent, who told him to take that week off and that if they were busy the next week they would call him (R. 138, 163). That same day the Union business agent unsuccessfully protested this layoff over the phone to the respondent (R. 117-119, 154, 164).

The next morning, May 27, 1958, petitioner sent a business agent with Welsch to the respondent's plant to "see what the problem was" (R. 119-120, 139, 147). Respondent's representative opened the meeting by stating that Welsch was discharged for unsatisfactory work (R. 39, 148, 140, 164). This was the first indication by the

respondent to either Welsch or a union representative that respondent was contemplating discharging Welsch (R. 164, 190, 119). Thereupon, the business agent reported this fact to the union hall by telephone and Russ Anderson forthwith sent a picket sign to the business agent and within a short time thereafter a one-man picket (R. 120, 141-142, 160) was established at respondent's plant and the employees went out on strike (R. 40, 59). The trial court found that "[t]he picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member" (R. 187). The strike continued for eight days, after which it was terminated pursuant to a temporary injunction issued in this action (R. 3-4).

As to the cause of the strike, the trial court stated (R. 164):

> "The employer was undecisive in its attitude toward Welsch and did not take a firm stand with reference to Welsch's unsatisfactory workmanship. This controversy would not have assumed its present proportions if the employer had taken a firm stand immediately after the accident and fired Welsch forthwith. It was difficult for the Union, in rallying to the assistance of one of its members, to comprehend why the employer would want to postpone the day of reckoning by giving Welsch an additional one week 'layoff' if his work was unsatisfactory to the point of necessitating his permanent separation from employment."

Neither party sought the assistance of the National Labor Relations Board at any time. After the termination of the strike on June 4, 1958, the parties agreed to arbi-

trate the issue of Welsch's discharge (R. 23, 209) and on November 7, 1958, some five months after the strike, the arbitrators rendered their decision that Welsch's work had been unsatisfactory, that this unsatisfactory work was the reason for his discharge on May 27, and that he was not entitled to reinstatement with respondent (R. 218).

DECISIONS BELOW

After trial, the state trial court issued a memorandum decision indicating that it would grant judgment for the plaintiff in the sum of $6,501.60 (R. 157-171). The application for a permanent injunction was abandoned as moot (R. 159). The union made a motion to dismiss the complaint notwithstanding the oral opinion (R. 175) by reason of the holding in *San Diego Building, etc., v. Garmon*,[4] which had been rendered by the United States Supreme Court after the trial in this action. The motion was denied and judgment entered (R. 191, 190). The judgment was based on the legal conclusion that:

> "The defendant's picketing of the plaintiff's premises was illegal and coercive." (R. 189)

On appeal by the union, the Washington State Supreme Court affirmed the judgment apparently on two separate theories: First, in tort, that the strike was an attempt to force the respondent to forego the exercise of a right expressly provided by the collective bargaining agreement, and secondly, in contract, even though a no-strike provision was not implied from the agreement, that the strike nevertheless constituted a violation of the contract.

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[4] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959)

The court dismissed from consideration §301 of the Taft-Hartley Act on the ground that §301 was solely a jurisdictional provision and did not affect the substantive law to be applied to the enforcement of contracts (R. 199).

The court dismissed the pre-emption argument with a determination that

> "[t]he instant case is not one in which it is clear, nor in which it may be fairly assumed, that the activity is protected by §7 or prohibited by §8 of the national labor relations act." (R. 195)

This court's decision in *San Diego Building Trades Council v. Garmon* was distinguished on the ground that "in that case [Garmon] the cause had proceeded through the courts on the assumption that it was an unfair labor practice."

SUMMARY OF ARGUMENT

The conduct in this case which the state trial court and the Supreme Court of Washington determined to be unlawful under state law, and for which judgment was awarded respondent, consisted of a strike and peaceful picketing to protest respondent's discharge of an employee whom respondent considered unsatisfactory. Although not free from doubt, the court below apparently rested its determination of unlawfulness upon the alternative grounds, first, of tort as an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement, and secondly, as a breach of contract on state contract law principles in the absence of a no-strike clause express or implied in the contract.

As to the tort ground, our position is that the National

Labor Relations Board had initial exclusive jurisdiction to determine whether the strike was an activity protected by §7 or prohibited by §8 of the Taft-Hartley Act, and that until the Board determined that the conduct was neither protected nor prohibited, the state court could not entertain jurisdiction of the tort action. Absent the contract, there is no question but that a strike to force reinstatement of a discharged employee is protected by the Act and cannot be made the subject of a tort action, regardless of state law. The contract merely constituted an additional factor to be considered by the Board in determining whether the activity involved was protected, prohibited, or unregulated by federal law. The Board frequently considers the legal impact of a collective bargaining agreement upon the factual and legal complex of a strike, when it is determining the propriety or impropriety of the strike, and it had primary exclusive jurisdiction to do so in the present situation. Thus the tort jurisdiction of the state court over this strike was preempted by the Act.

As to the possibility of a breach of contract, §301 vests federal courts with jurisdiction over actions for violation of labor contracts in industries affecting interstate commerce. We take no position as to the question whether state courts share this jurisdiction or whether it is exclusively in federal courts. We do assert that in breach of labor contract actions federal law must be applied and that incompatible local law must give way to federal law as embodied in §301. Our position in this regard is almost necessarily correct since otherwise the same contract would be subjected to interpretation and enforcement in accordance with two conflicting standards. It would thus result

in direct local impingement on an area of labor relations which Congress has sought to regulate.

The court below expressly applied local contract law unaffected by the substantive law of §301. It stated that this strike constituted a violation of the contract and that a no-strike provision, express or implied, was not necessary to such a holding.

We submit that the purposes and history of §301 dictate that strike prohobitions are not to be interpreted from a labor agreement unless the terms of the agreement show an intent to prohibit strikes. Congress was fully aware of no-strike provisions and indicated that it intended them to be one of the items to be excluded from or included in a labor agreement as the result of collective bargaining. The intent of the parties as expressed in the agreement is to be carried into effect in actions under §301. The existence of an arbitration procedure in the agreement is not conclusive of an intent to prohibit strikes, even though it is often and properly said that the no-strike clause is the *quid pro quo* for the arbitration clause. Certainly no one would maintain that an arbitration procedure was to be implied from a contract solely because of the existence of an express no-strike promise. In enforcing labor agreements under §301, courts have searched the language of the agreement to determine from that language whether it was in fact the intent of the parties that strikes be barred and under what circumstances they were intended to be barred. If such is done in this case, it will be apparent that no such intent can be derived from Local 174's agreement.

In this agreement it was provided that "the employer reserves the right to discharge any man" for unsatisfactory work. To "reserve" means to retain what one had rather

than to gain a new right. Thus, the employer retained the same right to discharge that he already had, absent the contract, and against the exercise of which the union would have been entitled to strike and picket. It is submitted that a strike prohibition cannot be inferred from this clause.

As to the arbitration clauses, the contract contains an express provision against work stoppages during arbitration as to the interpretation of the contract. The provision for arbitration of other differences between labor and management omits any such prohibition. Thus the wording of the arbitration provision shows an intent to retain the right to strike in disputes as to non-interpretative matters. This intent should be carried out, if the substantive law of §301 is applied to the *instant* case.

We urge this court to apply federal law to this case rather than sending it back to the state court for them to apply it because:

(1) The substantive law embraced in §301 is yet to be formed and when formed must harmonize with the entire structure of federal labor policy as embodied in the Taft-Hartley Act and other federal labor laws. A state court, largely unfamiliar with the aims and outlook of federal labor policy, is ill-suited to lay out the guide lines of §301.

(2) These matters have been argued fully to the court below and it cannot be expected that its opinion as to contract law in terms of §301 would differ materially from the opinion below which was in terms of general contract law.

(3) A decision by the court below would not be of much significance to courts confronted with §301 actions.

(4) This court has the entire record before it and is

in as good a position to render a decision as the court below. The interpretative issue will almost necessarily be decided by this court, whether expressed or unexpressed. Courts and litigants should have the benefit of that decision.

(5) The implied no-strike problem is an important one which arises frequently. Clarity in this area will constitute a substantial aid to industrial peace, as well as to lower courts and the National Labor Relations Board.

ARGUMENT

Introduction

While the trial court based its judgment solely in tort, the Washington Supreme Court sustained the judgment on the ground that the strike and picketing was both a tort and a violation of contract. Thus the court characterized the strike as "an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement" and "an attempt to coerce the respondent into foregoing his exercise of a contractual right," and referred to the damages as "the result of depriving that party of a contractual right." This sounds in tort. The state Supreme Court then went on to sustain the judgment as based upon a common-law breach of contract unaffected, as the opinion states, by §301 of the Taft-Hartley Act, and in the absence of an express or implied no-strike provision. It is submitted that, if the strike is viewed as a tort, the National Labor Relations Board had initial exclusive jurisdiction, and if it is considered as a violation of contract it is governed by §301 of the Act and applicable federal labor law, the Board having no jurisdiction of contract violations. For this reason, clarity requires that the tort and contract aspects of this action be discussed separately.

I

PRE-EMPTION OF TORT LIABILITY JURISDICTION

A. The conclusions reached by the Washington court are directly contrary to the decisions of this Court.

The Washington Supreme Court, focussing on only a portion of the *Garmon* opinion,[5] indicates in its opinion that Taft-Hartley pre-emption cannot be invoked against state jurisdiction except where the state court finds that the case is one "in which it is clear [or] in which it may be fairly assumed that the activity is protected by §7 or prohibited by §8 of the National Labor Relations Act." (R. 195). The opinion then quotes a portion of those two sections (omitting §8(d)) and finds that, since it could not be "fairly assumed" that the *instant* case fell within the protection or prohibitions of these two sections, the state court properly took jurisdiction of the action. It is submitted that this is an inversion of the jurisdictional standard set forth in *San Diego Building Trades Council v. Garmon.*

The test that this Court laid down in *Garmon* is that if the activity in question is "arguably" or "potentially" either protected by §7 or prohibited by §8 of the Act, the National Labor Relations Board is vested with primary exclusive jurisdiction. This exclusion precludes state control over the controversy whether that control is exercised through an administrative board, criminal prosecutions, a labor injunction, a damage award, or an anti-trust decree. *Amalgamated Association v. Wisconsin Employment*

[5]*San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959)

Relations Board, 340 U.S. 383, 95 L. ed. 364, 71 S. Ct. 359 (1951); *International Union v. Obrien*, 339 U.S. 454, 94 L. ed. 978, 70 S. Ct. 781 (1949); *Garner v. Teamsters, C. & H. Union*, 346 U.S. 485, 98 L. ed. 228, 74 S. Ct. 161 (1953); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959); *Teamsters Union v. Oliver*, 358 U.S. 283, 3 L. ed. (2d) 312, 79 S. Ct. 297 (1959). Congressional intent to vest the Board with exclusive control over all aspects of labor-management relations affecting interstate commerce except for suits under §301 and §303, was thoroughly explored and effectuated in decisions of this court throughout the development of the pre-emption doctrine under the Taft-Hartley Act. *Garner* case, *supra; Guss v. Utah Labor Relations Board*, 353 U.S. 1, 1 L. ed. (2d) 601, 77 S. Ct. 598 (1957); *Amalgamated Meat Cutters, etc., v. Fairlawn Meats, Inc.*, 353 U.S. 20, 1 L. ed. (2d) 613, 77 S. Ct. 604 (1957); *Garmon* case, *supra*. In supporting the Board's pre-emptive jurisdiction, this court has pierced through technical or legalistic concepts and looked to the substance of the state action to see whether it is in fact an exercise of control over labor-management relations, *Garmon* and *Oliver* cases, *supra*, or is merely an exercise of state jurisdiction over primarily local incidents which only incidentally relate to labor-management relations, *U. A. W. v. Russell*, 356 U.S. 634, 2 L. ed. (2d) 1030, 78 S. Ct. 932 (1958); *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed. (2d) 1018, 78 S. Ct. 923 (1958); *United Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 883 (1954) cases.

Unless such a realistic approach is adhered to, federal labor policy, as implemented by the National Labor Relations Board, will be frustrated or circumvented by the judicial inventiveness of state courts.

B. The instant strike was subject to Board regulation or protection in accordance with the Taft-Hartley Act.

The instant case concerns an economic strike and a one-man picket established by a union against an employer in protest against the discharge of one of its members—a situation clearly at the center of the area of labor-management relations intended for regulation by the Taft-Hartley Act. Concerted union activity to protest the discharge of an employee has long been recognized as a protected activity. Section 7 of the Act expressly guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection," and §13 similarly prohibits the application of the Act "to interfere with or impede or diminish in any way the right to strike . . ." except where "specifically provided for." It was long ago stated by Judge Learned Hand, in explaining the impact of this federal regulation in the situation presented by this case, in *National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 30 F.(2d) 503, 505-506 (CA 2, 1942):

> "When all other workmen in a shop make common cause with a fellow workman over his separate grievance and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or pro-

> tection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

It is also settled law that "The fact that the discharges being protested were lawful . . . does not preclude a strike in protest thereof being protected." *Summit Mining Corp. v. National Labor Relations Board*, 260 F.(2d) 894, 897 (CA 3, 1958). Indeed, it has frequently occurred in board cases involving this problem that the strike is precipitated by a discharge which is valid and proper under the collective bargaining agreement. As the decisions show, however, the strikers are nonetheless protected by the Act, e.g., *Cusano v. National Labor Relations Board*, 190 F.(2d) 898 (CA 3, 1951); *National Labor Relations Board v. McCatron*, 216 F.(2d) 212 (CA 9, 1954); cert. den. 348 U.S. 943, 99 L. ed. 738, 75 S. Ct. 365 (1955); *National Labor Relations Board v. Globe Wireless Ltd.*, 193 F.(2d) 748 (CA 9, 1951); *National Labor Relations Board v. J. I. Case Co.*, 198 F.(2d) 919 (CA 8, 1952) cert. den. 345 U.S. 917, 97 L. ed. 1351, 73 S. Ct. 729 (1953). As this court stated in the early days of the Wagner Act, the lawfulness of a strike under the federal law does not turn on "The wisdom or unwisdom of the men, their justification or lack of it . . ." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304

U.S. 333, 82 L. ed. 1381, 58 S. Ct. 644 (1938).*

It is, of course, true that the protection which §7 of the Act affords to strikers is withdrawn if the strike is in violation of an existing collective bargaining contract. *Natonal Labor Relations Board v. Rockaway News Supply Co.*, 345 U.S. 71, 80, 97 L. ed. 832, 73 S. Ct. 519, 31 ALR (2d) 511 (1953); *National Labor Relations Board v. Sands Co.*, 306 U.S. 332, 334, 83 L. ed. 682, 59 S. Ct. 508 (1939). For the reasons stated fully in a subsequent part of this brief, we do not believe that this strike was in violation of the contract. But it is not necessary to establish that Local 174 did not violate the contract in order to show that its conduct is subject to the provisions of federal act and therefore to the primary exclusive jurisdiction of the Board. The fact that the general rule which protects strikes is qualified to the extent that the contract may forbid such strikes, serves only to introduce an additional factor which Congress intended the National Relations Board to consider along with the rest of the factual and legal complex of the strike, in its regulation of this kind of situation. The interpretation of the agreement and its effect on the other factual and legal incidents

*The court below characterized the strike in the instant case as "in protest against the discharge of an employee for admittedly unsatisfactory work." (R. 195). It is submitted that this is a misleading characterization. While the union concedes that it cannot now challenge the arbitrators' finding that the employee's work was unsatisfactory, that finding was rendered some five months after the strike. At the time of the strike there was no admission or concession in this respect. On the contrary the trial court found that the employer's "undecisive" attitude toward the employee made it difficult for the union to understand the employer's position in respect to the sudden discharge of an employee for unsatisfactory work after offering him an additional one week "lay off" the night before. (R. 163-164).

surrounding the strike is initially for the Board to determine, not a circumstance which removes the strike from the scope of federal regulation. Cf. *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 4 L. ed.(2d) 454, 80 S. Ct. 419 (1960).

Thus the Board, in dealing with strike situations, frequently must consider whether a collective bargaining agreement operates to make invalid that which would otherwise be valid concerted action, e.g., *National Electric Products*, 80 N.L.R.B. 995, 999-1000 (1948); *The Fafnir Bearing Co.*, 73 N.L.R.B. 1008, 1009-1011 (1947). Particular cases may present the Board with difficult questions in this respect; refinements and distinctions have developed in the decisional law relating to the meaning and scope of collective bargaining agreements as they pertain to strike action, e.g., *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956); *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331, 77 S. Ct. 330 (1957). While these questions have complicated the Board's task in administering the Act, they certainly have not served to remove such cases from federal oversight.

In sum, the present case falls into a well-defined pattern of cases in which the Board has traditionally applied federal policy. Both the character of the strike and the applicability of provisions in the agreement which bear upon the right to engage in the strike are matters with respect to which the Board has evolved, over the years, an elaborate set of governing rules and principles appro-

priate to the complex field in which it operates. In these circumstances, there is no basis whatever for the premise of the decision below that the union conduct in question is not covered by the federal Act. On the contrary, the decision here must be that the federal Act does regulate the activity which the court below found unlawful under state law.

Thus in this case, if the Board had decided that the contract did not prohibit this strike, called for the purposes and under circumstances as found by the Board, the strike would have been an activity protected by §7 of the Taft-Hartley Act and could not have been made the subject of a state court action. If, on the other hand, the Board had determined that the strike was precipitated for a purpose or in a manner prohibited by the contract, then the question would arise as to whether it constituted an unfair labor practice pursuant to §8(b)(3) as defined in §8(d)(4) of the Act, in that it might be viewed as an effort to terminate or modify the contract in respect to discharges, without complying with the requisite waiting period and notifications. *United Mine Workers and Westmoreland Coal Company*, 117 N.L.R.B. 1072 (1957); *United Mine Workers and Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), and see 9 Labor Law Journal 406 (1958).[7] Or thirdly the Board might have determined

[7]Enforcement of each of these decisions was denied by the Court of Appeals of the District of Columbia by a decision divided two to one. *Local 9735 U. M. W. v. N. L. R. B.*, 258 F.(2d) 146 (App. D. C. 1958); *International Union, U. M. W. of A. v. N. L. R.B.*, 257 F.(2d) 211 (App. D. C. 1958). It is submitted that until this matter is settled finally, the Board's position on this point is at least arguably correct. Cf. Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 825.

that the strike was neither protected nor prohibited by the Act, in which case the state court could assume jurisdiction of this tort action.

But whatever the ultimate decision of the Board, or the view which it held as to the propriety of the strike, it was for the Board, and not the court, to make the initial jurisdictional decision in the light of its determinations, both factual and legal. To permit state courts to make such jurisdictional determinations in a case involving an economic strike against an employer, as was done by the court below, would frustrate national labor policy and would thwart uniformity of treatment in an area where uniformity is vital.

In its decision the court below seeks to justify its holding by a quotation (R. 197-198) from *Selles v. Local 174, etc.*, 50 Wn.(2d) 660, 314 P.(2d) 456 (1957), cert. den. 356 U.S. 975, 2 L. ed.(2d) 1149, 78 S. Ct. 1134 (1958), in which the Washington Supreme Court sustained state court jurisdiction of an action against a union on the ground that the right to damages for a common-law tort differed from any remedy which the Board had the power to provide and therefore was separate from and not in conflict with Taft-Hartley regulation. In the *Selles* case, judgment was granted to a union member against his union because it had prevented him from obtaining employment in his usual field of endeavor. This judgment could have been properly sustained on the ground that

the union activity on which it was based was merely a peripheral concern of the Labor-Management Relations Act. *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed.(2d) 1018, 78 S. Ct. 923 (1958).[8]

A common-law tort damage judgment, when granted as compensation for damage caused by a strike by a union against the employer concerning employment relations, can be as potent a control over that strike and employment relations as an injunction and is therefore repugnant to the exclusive jurisdiction over the contest given by Congress to the National Labor Relations Board. *San Diego Building Trades, etc., v. Garmon, supra.* This repugnance does not arise in two unrelated spheres, as the *Selles* opinion would urge, but constitutes a direct conflict between state and federal policy, in that two law-making sources are attempting to govern the same strike in accordance with conflicting standards. Insofar as remedies form an ingredient of any integrated scheme or regulation, to allow a state to grant a remedy in a situation where the Board would not grant one, accentuates the danger of conflict. The reasoning of the Washington court in the *Selles* case is directly at variance with the holding of this Court in the *Garmon* case and the application of such reasoning by the court below to the case at bar was improper. This Court stated in *Garner v. Teamsters, C. & H. Union*, 346 U.S. 485, 98 L. ed. 228, 74 S. Ct. 161 (1953), page 490:

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[8]Certiorari was denied by this Court in the *Selles* case one week after the decision in the *Gonzales* case, to which case the petitioner for certiorari in the *Selles* case tied its petition.

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rule to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible and conflicting adjudications as are different rules of substantive law."

II

VIOLATION OF CONTRACT

It is not clear whether an action pursuant to §301 can be brought in state courts as well as federal courts or whether federal court jurisdiction was intended to be exclusive. Since we did not challenge the state court's jurisdiction in this respect, either in the court below or in our Petition for Certiorari, we will not argue either side of this problem. It appears that this question will be answered in *Charles Dowd Box Co., Inc., v. Courtney et al,* No. 641, 1960 Term, which is set for argument just before the instant case. If in that case it is decided that state courts have no jurisdiction over §301 actions, the instant action must fail, even though we have not raised this question heretofore. For the firmly established rule

is that a jurisdictional question may be raised at any stage of a proceeding. *United States v. Corrick*, 298 U.S. 435, 80 L. ed. 1263 (1936); *Mitchell v. Maurer*, 293 U.S. 237, 79 L. ed. 338 (1934); *Central States Coop. v. Watson Bros. Transp. Co.*, 165 F.(2d) 392 (CA 7, 1947). In fact, it is the duty of a reviewing court, on its own volition and without respect to whether the question has been raised by the parties, to examine into the matter of jurisdiction. See *United States v. Corrick, supra*, at page 440, and *Central States Coop. v. Watson Bros. Transp. Co., supra*. Court initiative in this regard is especially necessary where, as here, improper exercise of jurisdiction is likely to effect an impairment of federal substantive law and policy.

If, however, the outcome of the *Dowd Box* case is to establish that state courts have concurrent jurisdiction over §301 cases, still the judgment below must be reversed, since, as will be shown, not only was federal law not applied where it was controlling, but the state law which was applied conflicted with and impaired rights established by federal law. For the purposes of this brief, therefore, we will assume that state courts have jurisdiction of actions brought pursuant to §301.

We do not contend that the National Labor Relations Board has been given pre-emptive jurisdiction over breaches of contract. The history of §301 of the Act shows clearly that Congress considered and rejected that legislative possibility. Our position is that since §301 created a federal cause of action for violation of a labor agree-

ment, that section and the resulting body of law usurped the entire field of breach of labor agreements in industries affecting interstate commerce, and that incompatible local law, whether common law or statutory, whether of general application or specifically directed at labor contracts, must yield to federal law. We will further show that proper application of federal law will result in a dismissal of this action and that hence the money judgment of the state court is an obstruction of federal labor policy.

A. The opinion on which the court below bases its judgment is in direct conflict with the decision of this Court in *Textile Workers Union v. Lincoln Mills*.

The opinion below states (R. 199):

> "Appellant contends, however, that §301 of the labor-management relations act, 29 U.S.C.A., §185, has supplanted common-law interpretation and enforcement of collective bargaining agreements.
>
> "Section 301 of the labor-management relations act confers jurisdiction upon lower federal courts to entertain suits based upon violations of labor agreements. We find nothing in the plain language of this statute which can reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied."

This statement stands squarely contrary to the holding whereby this Court definitely and finally decided that §301 established a substantive body of federal labor law for enforcement of labor agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957). In that case this Court stated with reference to suits under §301(a):

"Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate federal policy. Any state law applied, however, will not be an independent source of private rights." p. 456.

We cited and specifically discussed the *Lincoln Mills* decision to the court below, but the court appears to have ignored it. Having thus too easily disposed of §301, the court below was free to ignore any federal court precedents cited to them on the substantive law of labor contract violations as well as to ignore the legislative history of §301.

B. Where local contract law is incompatible with federal law as enacted in § 301 of the Taft-Hartley Act, it is pre-empted by § 301.

Since by §301 Congress enacted substantive law to govern violations of collective bargaining agreements, it would appear that it intended this law to pre-empt incompatible local law. For it is implicit in the Act that "for a state to impinge upon the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters, supra.*[9] As was stated by Justice Traynor in *McCarroll v. Council of Carpenters,* 49 Cal.(2d) 45, 304 P.(2d) 781 (1957):

"It is obvious that in exercising this jurisdiction

[9]As shown *supra* at page 16-17, if this strike was not prohibited by the labor agreement, it was an activity protected by §7 of the Act.

> [of actions under §301] state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements, otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought."

If in *San Diego Building, etc., v. Garmon, supra,* a money judgment based on local tort law and a state labor statute was considered an obstruction of federal labor policy, the present money judgment, based on local general contract law constitutes equally a frustration of federal policy, if, as we will show later, federal policy holds that the strike did not constitute a violation of the labor contract. State control over the strike is asserted by a money judgment to exactly the same extent, whether the judgment is founded on contract or tort, and the measure of local impingement on the area of labor combat designed to be free is just as great in either situation. Activities designed to be protected by §7 of the Act are thereby made illegal, and the judgment constitutes a penalty against the union for having engaged in the protective activity.

The court below seeks to justify its conclusion by grounding the judgment in general common law contract liability, and therefore beyond or apart from pre-emption by the Taft-Hartley Act. However, it was stated in *Weber v. Anheuser-Busch*, 348 U.S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955):

> "Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the state cannot be heard to say that it is enjoining conduct for reasons other

than those having to do with labor relations." p. 480.

C. The judgment of the court below as to violation of contract is incompatible with federal law as enacted in § 301.

1. *The purposes and history of § 301 dictate that strike prohibitions are not to be imported to a labor agreement unless the terms of the agreement show an intent to prohibit strikes.*

The opinion below states (R. 199):

> "The appellant next contends that the picketing involved in the instant case was not in violation of the collective bargaining agreement, unless the agreement expressly or impliedly contained a no-strike provision. We disagree."

Express no-strike provisions have been frequently included in labor agreements since the beginning of the union movement and are now common to the point of being normally expressed in collective bargaining agreements, not casually, but frequently in close detail. The Bureau of National Affairs in 1948, from a survey of 1,300 collective bargaining contracts, found that 80 per cent contained some form of express no-strike clause of which about two-thirds amounted to an absolute ban on stoppages during the life of the contract. The remaining one-third were promises to refrain from work-stoppage until the grievance procedures were exhausted. Volume 32, Labor Relations Reference Manual, page 6. In 1957 the same organization surveyed 400 representative contracts and found that 89% of them contained some form of express no-strike agreement; 37% provided an absolute

ban on strikes and 52% were conditioned on various internal procedures or events. Labor Relations Reporter, LRX 87, Section 14; and see Thayer, Collective Bargaining Patterns in Spokane County, Washington (1952) pp. 176-187. There can be little question but that the 80th Congress was thoroughly familiar with the existence and significance of no-strike provisions.

It is clear that the purpose of Congress in enacting §301 was in large part to provide employers with a remedy for breach of no-strike agreements. As the Senate Committee put it:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 16. See also H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess. 297, 337.

If we concede, as we must, that the principal object which the sponsors of §301 (a) and (b) sought to reach was unions which breached the no-strike provisions of their agreements, we do *not* concede that Congress considered

every collective bargaining contract as containing such a provision either expressly or by implication. It would have been simple to have provided a statutory prohibition against all strikes during the term of the agreement. No such prohibition was enacted. On the contrary the Senate Committee in discussing §301 stated:

> "It has been argued that the result of making collective bargaining agreements enforceable against Unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> "This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of Union responsibility for breach of contract. Four states—Minnesota, Colorado, Wisconsin and California — have thus far enacted such laws, and, so far as can be learned, no-strike clauses have been continued about as before.
>
> "In any event, it is certainly a point to be bargained over and any Union with the status of 'representative' under the NLRA which has bargained in good faith with an Employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." Sen. Rep. 105, Part 1, 80th Cong., 1st Sess. (1947), pp. 17-18.

From this it seems clear that Congress intended that the no-strike clause was an item to be included in or excluded from a labor agreement as a result of collective bargaining. See also Sen. Minority Report 105, Part 2, 80th Congress, 1st Session (1947) p. 22. Such being the case, a strike prohibition is not to be implied merely from the existence

of a collective bargaining contract, as the court below appears to believe.

While it is frequently and properly stated that the no-strike clause is a *quid pro quo* for the arbitration clause, *Textile Workers Union v. Lincoln Mills*, 343 U. S. 448, 455 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957); *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 4 L. ed.(2d) 1403, 80 S. Ct. 1343 (1960); *Ford Motor Co. and the United Automobile Workers*, 6 Lab. Arb. 799, 801 (1947), this comment has reference to the issues commonly dealt with at the collective bargaining table and does not apply to the interpretation of an executed agreement which intentionally omits any no-strike provision or provides only a conditional strike prohibition. To suggest that an arbitration provision necessarily implies an unexpressed no-strike promise would deprive the parties of the right to set the terms of their agreement in accordance with the results of their bargaining. The fact that the large majority of contracts contain both arbitration and no-strike clauses does not mean that the two provisions must go hand in hand. It would be as unrealistic to say that an unexpressed prohibition against strikes is to be implied from an arbitration provision standing by itself as to say that an unexpressed arbitration provision is to be implied from a no-strike provision standing by itself.

In enforcing a labor agreement under §301, courts must adhere to the intent of the agreement rather than to any formalized rule that ignores intent. If a contract contains an arbitration procedure but does not show an intent to

eliminate the right to strike, the right to strike should be preserved. §8 (d) of the Act provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." The fact that an unusually strong union can obtain unusually favorable terms does not mean that those terms should be ignored or diluted. §301 of the Taft-Hartley Act did not authorize courts to look into the wisdom of the terms of labor agreements. It authorized the enforcement of agreements resulting from collective bargaining, whether they be wise or unwise, evenly balanced or one-sided. Cf. *N.L.R.B. v. Mackay Radio & T. Co.*, 304 U. S. 333, 344; 82 L. ed. 1381, 1389, 58 S. Ct. 644 (1938). The objective of collective bargaining is to reach contractual undertakings arrived at by both parties knowingly and intentionally. Basic in Congressional labor policy is the philosophy that the free flow of commerce will be fostered by voluntary bargaining resulting in intentional agreements. This policy is frustrated *pro tanto* when consequences are imported to a contract beyond those undertaken by the parties, either expressly or by necessary implication.

In the present-day approach to this problem, courts have searched the language of the contract to determine whether or not it was the intent of the contracting parties that strikes be barred and under what circumstances they were intended to be barred. *United Construction Workers v. Haislip Baking Co.*, 223 F.(2d) 872 (CCA 4, 1955) cert. den. 350 U. S. 847, 76 S. Ct. 87 (1955); *Teamsters Union v. Mead, Inc.*, 230 F.(2d) 576 (CCA 1, 1956);

Lewis v. Benedict Coal Corp., 259 F.(2d) 346, (CCA 6, 1958), affirmed as to contract interpretation by equally divided court: 361 U.S. 459, 4 L. ed.(2d) 442, 80 S. Ct. 489 (1960); *U.M.W.A. v. N.L.R.B.*, 257 F.(2d) 211 (App. D. C. 1958). In each of these cases the court examined the wording and context of the labor contract with particular reference to the wording of the arbitration clause, to determine whether the words implied an agreement not to strike. In all but *U.M.W.A. v. N.L.R.B.*, the Court found that the agreement implied a no-strike provision. In the *U.M.W.A.* case, the court held that no such intent was to be found, and therefore the strike was not a violation of the contract. This Court has shown reluctance to infer that a no-strike provision in a contract was applicable at a time when bargaining was in progress relating to modifications in the contract, *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331, 77 S. Ct. 330 (1957), and has refused to interpret an all-inclusive no-strike agreement to be applicable to a strike in protest against unfair labor practices. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956). In both cases this Court reached this decision because of the intent of the parties to the contract as the Court perceived it. Thus, it is clear that under the Taft-Hartley Act courts will not import strike prohibition to a labor contract unless the terms of the agreement express or imply an intent on the part of the union to agree to such a prohibition.

Unless the intent of the parties to the contract is given effect by courts, negotiators of collective bargaining agreements will not be able to know whether the limits or con-

ditions of no-strike undertakings will indeed establish the limits of the strike prohibitions; likewise parties to an existing agreement will not know whether the strike prohibitions and reservations negotiated in the contract will carry a consequence different from those intended by the parties to the labor agreement. The decision to strike or not to strike commonly must be made quickly and without opportunity for detailed legal research. As long as it is the policy of the law to protect the right to strike, the terms conditioning that right should be as explicit and comprehensible as possible. The only guide to attain this objective is to look to the intent of the parties expressed in or implied from the terms of the agreement.

2. *A proper application of federal law shows that this strike was not prohibited.*

Respondent, in the court below, contended that two provisions in the collective bargaining contract gave rise to an implied agreement to prohibit the strike involved in this suit:

(a) The provision reserving to the employer the right to discharge for unsatisfactory work, and

(b) The arbitration provision.

The court below made no reference to the arbitration provision but relied entirely on the discharge provision.

Article II of the contract (R. 202) provides:

> "The *Employer reserves* the right to discharge any man in his employ if his work is not satisfactory." (Emphasis added.)

This provision is written in terms of *reservation* of right

by the employer, rather than the *granting* of a right to the employer. To reserve means to keep what one had, not to gain a new right. Thus the employer reserved the same right that he already had, absent the contract, and against the exercise of which right the union would have been entitled to strike and picket. It is difficult to see how this employer reservation gives rise to a strike prohibition against the union.

We agree with the court below that one of the reasons motivating the employer to enter the collective bargaining agreement was the hope of avoiding industrial strife. But this does not mean that whenever this hope is frustrated he has a cause of action for breach of contract. The fact that this contract was not as comprehensive as most such agreements and that it dealt with only a fraction of the problems normally covered by labor contracts, does not mean that the Court should fill in the interstices of the agreement with implications which cannot be realistically seen as intended in the agreement. In practice a collective bargaining contract rarely expresses full coverage of all relations between employer and the union. "It covers only such matters as the parties have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party." *United States Steel Corp. v. Nichols*, 229 F.(2d) 396, 399, 56 ALR(2d) 980 (CCA 6, 1956), cert. den. 351 U.S. 950, 100 L. ed. 1474, 76 S. Ct. 846. So in this contract, the parties expressly inserted a no-strike provision

applicable to a limited situation not relevant to the instant strike. They made no such provision with reference to Article II. It is submitted that there is no indication of an intent that a strike prohibition should be applicable to the Article II situation.

It might be asked what was the purpose or significance of Article II if it was not intended to imply a no-strike provision. We feel that Article II was put into the contract to assure the employer of his right to discharge an unsatisfactory employee without involving himself in a breach of contract action, despite the seniority provision (Article VI, R. 204), the union shop agreement (Article I, R. 202), or the anti-discrimination provision (Article III, R. 203). While none of these articles of the contract specifically and necessarily militate against the right to discharge for incompetence, each constitutes a substantial limitation on the employer's freedom to discharge or lay-off employees at will. Such limitations on his freedom could well give an employer concern that the right to fire for incompetence was being taken out of his hands. To assure that this was not the intent of the agreement, Article II would serve a definite purpose, without coupling it with an "implied" no-strike provision.

The arbitration clause in the contract is as follows (R. 208):

"ARTICLE XIV

"Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said

members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

"Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

It is to be noticed that the first paragraph makes express provision against suspension of work during proceedings to arbitrate a dispute as to the interpretation of the contract, but that the second paragraph providing for arbitration of other differences omits any such prohibition. It is not contended, nor could it be, that this strike involved a dispute as to the interpretation of the contract. There was no dispute as to the meaning of its language. The dispute concerned whether the discharged employee's work had been satisfactory or not—a dispute as to fact.

This dispute therefore came under the second paragraph of Article XIV, the catch-all arbitration provision. That paragraph omitted any work-stoppage provision. The union showed a willingness to waive the right to strike over the interpretation of the contract but specifically omitted any such waiver of the right to strike on other matters. As to those matters arbitration was available, if desired, but not at the expense of the right to strike. This was a standard contract executed with approximately 465 companies in Seattle (R. 134). A dispute in one plant as

to the interpretation of the contract would presumably affect the interpretation of the contract with many other companies, and therefore as to that, arbitration was preferred over a test of economic strength. The impact of the ordinary non-interpretative dispute would be limited to the parties involved and as to that, the strike was intended to remain available, along with arbitration. One surmises that the right to strike in these matters was retained primarily for the purpose of bringing a few recalcitrant employers in line with the bulk of the 465 as to whom little trouble was anticipated.

Thus the wording of the arbitration clause is in such form as to show an intent to retain the right to strike except as to interpretative disputes. Parties to collective bargaining negotiate from strength and the resulting contract is the reflection of the relative strengths of the parties. If Local 174 was strong enough to get an arbitration provision without giving up the right to strike, courts should leave them with the fruits of their strength, at least until a different policy is promulgated by Congress.

It is therefore submitted that if the intent of parties as expressed in the contract is to govern, and federal law applied to such intent, the strike involved in this action was a protected activity, and the judgment of the court below is an interference and obstruction of the protection afforded by federal law. As such it must fall.

D. This Court should apply § 301 instead of remanding to state court to apply federal law.

While the court below expressly refused to apply

federal law to this contract situation, we submit that no benefit would be derived from remanding it with instructions to apply federal law.

Firstly, the federal law embraced in §301 is yet to be formed even in its broadest outlines. These outlines must be delineated ultimately by this Court so as to establish the necessary guide lines for lower courts to follow. To send it back to the Washington Court with instructions to lay out those guide lines would impose a greater burden than that court should be called upon to bear in the present posture of the law. State courts, primarily occupied with local problems, are largely unfamiliar with the outlook and aims of the Taft-Hartley Act. §301 must be interpreted and applied to conform to the entire structure of federal labor policy as set forth in the Taft-Hartley Act and other federal labor laws. *Textile Workers Union v. Lincoln Mills, supra.* Most aspects of the Taft-Hartley Act never come before state courts, whereas federal courts have been dealing with and have been involved in the development of federal labor policy since before 1937. If the remand in this action were to a federal court, an interpretative decision on remand might be helpful in the development of the body of law surrounding §301. To remand this to the state court for interpretation would result in confusion, without benefit to the parties or to the development of the law.

Secondly, the question as to the implications of the contract with respect to strike prohibitions was argued at length to the court below, which answered it in terms of

general contract law adversely to our position. The Opinion below shows clearly the state court's legal approach to the problems arising out of this agreement and this strike, from the standpoint of general contract law. A further decision from that court in terms of §301 cannot reasonably be expected to differ materially from that approach in the present undeveloped state of the substantive law embraced in §301.

Thirdly, a decision by the state court in terms of §301 and federal law would carry little significance to other lower courts in building a structure of labor contract law, as contrasted to a decision by this Court. Courts, increasingly often confronted with suits under §301, would find an interpretative decision by this Court in the instant case a welcome beacon to guide them in what is presently an uncertain area.

Fourthly, the facts of this case are simple and undisputed. There are no factual determinations to be made upon remand. The record before this Court is complete, and this Court has as full an opportunity to decide this issue as the Court below. The interpretative issue will almost necessarily be decided by this Court, whether expressed in or omitted from the ultimate decision. Courts and litigants should have the benefit of that decision.

Finally, enforcement of no-strike provisions was a matter of primary concern to Congress when it enacted §301. The circumstances from which a strike prohibition will or will not be implied, where not expressed in a contract, is presently a matter of substantial importance and con-

cern in industrial relations. Clarity in this area will constitute a substantial aid to industrial peace, to lower court litigation, and to the National Labor Relations Board.

In *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331 (1957), this Court decided a problem of contract interpretation which had not been passed on by the Circuit Court of Appeals or by the National Labor Relations Board. The present action is more ripe for decision by this Court than was the *Lion Oil* case, in that the interpretative question was presented to the court below in federal terms and was decided by that court in terms of general state law.

Similarly in its opinion in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 4 L. ed.(2d) 442, 80 S. Ct. 489 (1960), this Court examined at length the terms of a collective bargaining agreement and based a modification of the judgment below on its interpretation of the agreement. In numerous other cases this Court has directly inquired into the legal consequences of labor agreements. *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 97 L. ed. 832, 73 S. Ct. 519, 31 A.L.R.(2d) 54 (1953); *National Labor Relations Board v. Sands Co.*, 306 U.S. 332, 83 L. ed. 682, 59 S. Ct. 508 (1939).

Thus there is ample support, both in reason and in precedent, for this Court to determine whether the legal consequences of this labor contract are such as to warrant a judgment in favor of the respondent pursuant to §301 of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

Section 7 of the Taft-Hartley Act; 29 U. S. C. §157; 61 Stat. 140:

Rights of Employees

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 (b) (3) of the Taft-Hartley Act; 29 U. S. C. §158 (b) (3); 61 Stat. 141:

Unfair Labor Practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 8 (d) of the Taft-Hartley Act; 29 U. S. C. §158 (d); 61 Stat. 142-143:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotia-

tion of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . ."

Section 301 of the Taft-Hartley Act; 29 U. S. C. §185; 61 Stat. 156-157:

Suits by and against labor organizations

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determin-

ing whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."